BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARGARET M. BIEBERLE Claimant	)	
VS.	)	
STATE OF KANSAS Respondent	)	Docket No. **1,064,235**
AND	)	
STATE SELF-INSURANCE FUND	)	

ORDER

Claimant requests review of the July 9, 2013, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for the self-insured respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits, dated July 9, 2013, and all pleadings contained in the administrative file.

The ALJ found claimant failed to sustain her burden of proof that her injury arose out of and in the course of her employment with respondent.

ISSUES

Claimant requests review of whether the ALJ erred in denying claimant's accidental injury arose out of and in the course of her employment.

Respondent argues claimant's injury falls within the provisions of K.S.A. 2012 Supp. 44-508(f)(3)(A) and that the ALJ correctly found the claim not compensable.

The sole issue on review is: Did claimant's accidental injury arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Margaret Bieberle worked for the Kansas Lottery for 17 plus years. For the six years prior to her injury, she worked as the Lottery's advertising coordinator. Claimant described her January 16, 2013, accident as follows:

> Well, I was walking down the hallway to go on a walk for the Governor's Fitness Challenge, and, um, I was walking briskly because I wanted to go with the group and go to the restroom before we left. And I turned around to talk to one of the other employees, answer a question or such, and kind of was walking backwards, and I stumbled, so I went down, right in the hallway just from my office.[1]

Claimant landed on her left wrist. She was transported by ambulance to St. Francis Health Center, where she was diagnosed with a fracture of the left distal radius. The following day, Dr. Kenneth Gimple performed surgery consisting of: (1) an open reduction and internal fixation of a two part left distal radial fracture; and, (2) a left carpal tunnel release.[2]

Claimant testified that walking down the hallway where she fell was a regular part of her job. Claimant described the hallway as a "main" hallway that was carpeted. The hallway was located in one of two adjacent buildings used by the Lottery. The buildings were separated by parking lots. The hallway in which claimant fell was in the building where claimant's work station was located. Claimant's job apparently required her to work at a desk, but she testified there could be a lot of walking in her job. She went back and forth between the buildings "quite often."[3] Her trips between the buildings occurred on a daily basis and, at times, several times per day. She used the same hallway when she walked back and forth between the two buildings.

Apart from the group walking in connection with the Governor's challenge, claimant testified she engaged in walking as personal exercise. She walked at a high school track at least two times per week for approximately 30 minutes per session. Claimant testified she walked more at work than at home.

---

[1] P.H. Trans. at 7.

[2] Claimant told Dr. Murati she had been diagnosed with left carpal tunnel syndrome before her fall at work.

[3] *Id.* at 10.

When claimant fell, she was proceeding to the restroom, from which she intended to join her "team" of fellow employees, all of whom were participating in the Governor's fitness/weight loss challenge. The team's participation in the challenge took the form of walking as a group. The challenge program was not required by respondent and claimant considered her involvement voluntary.[4] There were cash prizes to be awarded when the challenge ended.

Immediately before she fell, claimant began talking to a co-employee, Janet Call. While so engaged, she was "briskly" walking backwards. Claimant believed that the subject of her conversation with Ms. Call was work-related, but claimant could not recall the specific nature of the conversation.[5] Ms. Call was not a member of claimant's team in the Governor's challenge. Claimant had not gone on break when she fell. Claimant could not recall what caused her to fall. Claimant testified she "just stumbled."[6] Claimant was carrying her coat when she fell, but she could not say it caused her to fall. Before the fall, claimant had changed her shoes and was wearing athletic shoes.

Dr. Murati performed an examination at the request of claimant's counsel on May 14, 2013. Dr. Murati concluded claimant's injuries were the direct result of the accident and that the prevailing factor in the development of claimant's condition was the accident at work.[7]

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 states in part:

---

[4] P.H. Trans. at 19.

[5] *Id.* at 16-17, 20-21.

[6] *Id.* at 12.

[7] *Id.*, Cl. Ex. 2 at 2-3.

(d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.

. . .

(f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given

> case, the administrative law judge shall consider all relevant evidence submitted by the parties.
>
> (h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

The undersigned Board Member agrees with the ALJ that claimant has not satisfied her burden of proof that the accidental injury she sustained arose out of and in the course of her employment.

There is no evidence explaining why claimant fell. There is no evidence that anything about claimant's fall was related to her job for respondent. The amount of walking required by claimant's employment and the frequency with which she traversed the hallway where she fell are not relevant under these circumstances. Claimant was not merely walking down the hallway when she was injured. She was instead briskly walking backwards. There is nothing in this record which establishes a connection between walking backwards and the nature and requirements of claimant's work.

Claimant's testimony is undisputed that she did not know why she fell. She described no slip, no trip, no twist, and no blunt force trauma. Claimant's employment exposed her to no increased risk or hazard of falling while walking backwards to which claimant would not have been exposed in normal non-employment life. No evidence proves a causal connection between the conditions under which the work was required to be performed and the resulting injury. To the extent that there is no evidence establishing a cause of claimant's fall, claimant's accidental injury arose directly or indirectly from idiopathic causes.

The risk of sustaining accident or injury under these circumstances is personal or perhaps neutral, but the preponderance of the evidence does not prove the risk was associated with the job claimant performed.

Claimant relies on *Ruebke*,[8] in which Ms. Ruebke and an associate were preparing to receive a delivery by getting as much as they could out of respondent's back room and stocking the shelves to make room for new merchandise. Ms. Ruebke testified she was on her way to the back room and as she rounded a corner her ankle rolled, causing her ankle to snap and her to fall. Ms. Ruebke testified she did not slip, trip or run into anything to cause her fall. The Board Member who decided *Ruebke* found that she sustained a

[8] *Ruebke v. Sally Beauty Company*, No. 1,060,391, 2012 WL 4763704 (Kan. WCAB Sep. 24, 2012)

personal injury by accident arising out of and in the course of her employment with respondent, stating:

> This Board Member finds that claimant has satisfied her burden of proving that the accidental injury in question arose both out of and in the course of her employment with respondent. The turning of the ankle was the prevailing factor causing the injury. This, coupled with the fact claimant's work required her to be on her feet for most of an 8 hour day indicates that claimant's walking at work was more than the normal activity of day-to-day living. The Order of the ALJ is affirmed.

Ruebke is factually distinguishable from this claim. The claimant in *Ruebke* was injured while walking around a corner, causing her ankle to roll and snap and Ms. Ruebke to fall. In that claim, Ms. Ruebke was walking. Ms. Ruebke's job required her to be on her feet most of every eight-hour working day. In this claim, however, claimant was injured when she fell walking backwards while talking with a co-employee. Nothing about claimant's job required her to walk backwards. Although claimant believed her conversation with her co-employee was work-related, claimant admitted she did not recall what she and Janet Call were discussing. When claimant fell, she was not engaged in the performance of her job duties.

In *Graves*,[9] the issue was whether the injury arose out of the employment. The Order in Graves stated:

> As the accident and resulting injury occurred as claimant was getting out of her employer provided truck, to retrieve an [sic] piece of equipment for the specific purpose of performing one of the duties of her job, it would seem that the accident occurred in the course of her employment. However, the Kansas legislature has significantly amended the Kansas Workers Compensation Act (Act), applying a stricter burden to claimant than before.
>
> The ALJ, in the February 23, 2012 Preliminary Hearing Order, determined that the accident and resulting injury were the result of a risk which was "not particular to the job". Thus, the ALJ apparently concluded that the risk was of a neutral nature. Under the new version of K.S.A. 44-508(f)(3), a neutral risk is no longer compensable in Kansas. Additionally, an idiopathic injury is no longer compensable. Here, claimant felt a sudden pain in her knee. But she was unable to identify the cause of the injury. She did not describe a slip on a slick surface, nor did she describe a trip, twist, slip or any other cause for the onset of her knee pain other than simply stepping out of the truck. Claimant was not even able to describe the surface she placed her foot on. The determination by the ALJ that the 2011 version of K.S.A. 44-508(f) prohibits an award in this matter is affirmed.

---

[9] *Graves v. Professional Service Industries, Inc.*, No. 1,059,190, 2012 WL 1652982 (Kan. WCAB Apr. 20, 2012).

In *Graber*,[10] the Board Order stated:

> Prior to the enactment of the new Act in Kansas, injuries which were clearly attributable to a personal condition of the employee and no other factor were not compensable. However, where an injury is attributable to a personal condition and some hazard of employment, compensation is usually allowed [citation omitted]. According to Larson's, [citation omitted] the majority of jurisdictions compensate workers who are injured in unexplained falls based upon the analysis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working. Kansas fell within this majority. However, the Kansas legislature, in its 2011 rewrite of the Act has displayed a clear intent to exclude such unexplained injuries from compensation. Not only are neutral risks no longer compensable, any unexplained accident is also excluded from compensation.
>
> Here, claimant suffered a fall of unknown origin or cause. He remembers nothing from the time he entered the restroom until he awoke while being loaded on the helicopter. There were no witnesses to the fall, and video tape of the area provided no help. This Board Member finds that claimant's accident did not arise out of and in the course of his employment as defined under the new Act in Kansas. The accident and injury arose from idiopathic causes. The new Act specifically excluded such events from coverage.

The rationale of *Graves* and *Graber* compels the denial of Ms. Bieberle's claim because there was insufficient proof that her accidental injury arose out of and in the course of her employment.

CONCLUSION

This Board Member finds that the ALJ's Order should be, and hereby is, affirmed in all respects.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

---

[10] *Graber v. Dillon Companies*, No. 1,057,449, 2012 WL 2890470 (Kan. WCAB Jun. 22, 2012).

[11] K.S.A. 2012 Supp. 44-534a.

[12] K.S.A. 2012 Supp. 44-555c(k).

WHEREFORE, the undersigned Board Member finds that the July 9, 2013, Preliminary Hearing Order entered by ALJ Rebecca A. Sanders is affirmed.

IT IS SO ORDERED.

Dated this 23rd day of September, 2013.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
jeff@jkcooperlaw.com

Nathan D. Burghart, Attorney for Respondent
nate@burghartlaw.com; stacey@burghartlaw.com

Honorable Rebecca A. Sanders, Administrative Law Judge